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Supreme Court, U.S.
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IN THE
Supreme Court of the United States

BE&K CONSTRUCTION CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR SOCIETY FOR HUMAN RESOURCE MANAGEMENT AND LPA, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF *AMICI* INTEREST[1]

The Society for Human Resource Management ("SHRM") is the largest human resource management association in the world. SHRM provides education and information services, conferences and seminars, government and media representation, online services and publications to more than 165,000 professional and student members throughout the world. LPA, Inc., The Labor Policy Association, is a public policy advocacy organization representing senior human resource executives of over 200 leading employers doing business in the United States. Collectively, LPA members employ over 19 million people worldwide and over 12 percent of the U.S. private sector workforce. LPA's members are employers subject to the National Labor Relations Act ("NLRA"). Certain members of LPA have been victims of corporate campaign tactics, similar to those involved in this case. Because of their interest in the development of the nation's labor laws, LPA and SHRM have participated as amicus curiae on many important labor law issues before this Court, the United States Courts of Appeals and the National Labor Relations Board ("NLRB" or "Board").[2] The instant matter is of interest to SHRM and LPA because both believe that the Board's and the Sixth Circuit's decision is in error because (i) it is an incorrect interpretation and application of the case law; (ii) it is a violation of the First Amendment by placing a serious impediment upon the rights of employers and

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[1] Counsel for all parties have consented to the filing of this brief, and their consents have been filed with the Clerk of this Court. No counsel for either party had any role in authoring this brief, and no other person other than the named *Amici* and their counsel has made any monetary contribution to the preparation and submission of this brief.

[2] *See, e.g., NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001); *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359 (1998); *NLRB v. Webcor Packaging, Inc.*, 118 F.3d 1115 (6th Cir. 1997), *cert denied*, 522 U.S. 1108 (1998); *Bob Evans Farms v. NLRB*, 163 F.3d 1012 (7th Cir. 1998); *Crown Cork & Seal Co.*, 334 NLRB No. 92 (July 20, 2001).

unions who may be involved in labor disputes to seek judicial redress; and (iii) it creates a significant practical barrier for parties to pursue legitimate litigation options because of the substantial likelihood of being found in violation of the NLRA, and correspondingly being exposed to the imposition of the extraordinary remedy of being required to pay the other party's attorneys fees and costs.

INTRODUCTION AND SUMMARY

The instant matter involves the basic right of access to judicial adjudication and redress of legal rights as guaranteed by the First Amendment. Indeed, this fundamental right to petition to the courts is "intimately connected, both in origin and in purpose, with other First Amendment rights of free speech and free press." *United Mine Workers v. Ill. State Bar Ass'n,* 389 U.S. 217, 222 (1967). This matter addresses the rights of parties that become involved in a labor dispute to initiate litigation against the other party without being found to have violated the NLRA and thereby be subjected to a remedy of paying the attorneys fees and costs of the defendant litigant. The facts of the instant matter involve an extensive "corporate campaign" against BE&K Construction Co. by various labor unions to force the employer to change its decision to construct a power plant with both union and non-union workers. The unions in question filed various administrative and judicial actions against BE&K in an attempt to force it to agree to their demands. The unions also initiated various administrative and regulatory filings, picketing and handbilling activity and lobbying initiatives with various state and local governmental entities. Acts of violence were also committed against BE&K and its joint venture partner for proceeding with the project without a commitment to exclusively utilize labor union workers. In response to these actions, BE&K filed various lawsuits and an NLRB charge against the unions that were involved. The Company's litigation responses were either dismissed by the courts or voluntarily withdrawn; its NLRB charge was found to have

merit. Based upon BE&K's unsuccessful litigation initiatives, the defendant labor unions filed § 8(a)(1) unfair labor practice charges with the NLRB and alleged that such litigation by BE&K was an unlawful retaliatory response against the unions with an objective to interfere with the subject unions' rights under the NLRA. The NLRB found merit in the charge and the Sixth Circuit enforced the Board's Order. The Board, as a remedy in this matter, ordered BE&K to pay—contrary to the American Rule that each party in a lawsuit pay its own legal fees and costs—the unions' attorneys fees and costs in defending against the employer-initiated litigation.[3]

This matter, in addition to involving the important First Amendment right of access to the courts, also involves important public policy questions, particularly given the increased use of "corporate campaign" initiatives by labor organizations against employers.[4] Such "campaigns" can

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[3] The NLRB has not yet issued an Order stating the amount of fees and costs that BE&K is required to pay to the charging party unions. Representatives of the unions in question, however, have stated that the amount that BE&K will have to reimburse them for their litigation costs and fees will total "hundreds of thousands" and potentially "millions" of dollars. Interest also could be assessed on any such fees. *See* 204 Daily Reporter (BNA) A-11, A-12 (Oct. 22, 1999).

[4] Section III of this Brief discusses corporate campaigns in detail. Briefly stated, such "labor disputes" are broad-based initiatives by unions against employers and have one or more of the following objectives: (i) pressure an employer to recognize a union as the exclusive representative of its employees without the benefit of a secret ballot vote conducted by the NLRB—in many instances the union is, at best, a "minority" union and does not enjoy majority support of the employees in the unit in question; (ii) pressure an employer to agree to union demands in contract negotiations when the union is unable to obtain such objectives at the bargaining table; (iii) pressure third parties not to do business with the target employer (*e.g.*, boycott and similar tactics); (iv) pressure an employer not to do business in a particular industry on a non-union basis; (v) pressure an employer not to do business in a particular geographic area on a non-union basis (the instant situation); or (vi) pressure an employer

inflict considerable economic damage on employers, cause the target business to suffer loss of reputation and standing, and if the Board's and lower court's decision herein is not reversed, cause employers who respond to a "corporate campaign" with litigation initiatives, to face the substantial likelihood of being found in violation of the NLRA with a corresponding remedy of being ordered to pay the attorneys fees and costs incurred by the union in such litigation. It is critical that this Court apply the fundamental principles contained in the NLRA to this matter to maintain the delicate, but essential, balance of rights of employers and labor organizations in resolving labor disputes. Such balance, as this Court is well aware, is an essential element of Federal labor law policy and is critical to prevent unnecessary industrial strife. Equally, it is important to maintain such balance to provide appropriate regulatory and statutory incentives for parties to peacefully resolve labor disputes. If union corporate campaigns are permitted to proceed without the ability of target employers to respond with appropriate litigation initiatives, the delicate "check and balance" system of Federal labor policy will be substantially disrupted and additional industrial conflict will be encouraged.

SHRM and LPA respectfully request this Court to clarify its decision in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), and to provide clear guidelines in this area. Specifically, *Amici* submit that given the substantial precedent in other areas of the law providing protection to parties pursuant to the First Amendment to petition the courts for redress of their grievances, that a test be established that would require the Board to find litigation by parties involved in a labor dispute in violation of the NLRA only if (i) said proceedings were without any legal bases, that is, frivolous, or

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to pay a certain level of wages and benefits to its employees. In all of the above examples, except perhaps (i), the union(s) in question have no intent or practical likelihood of representing the employees of the target employer.

"objectively baseless" as articulated by this Court in *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 55 (1993) *and* (ii) said proceedings were brought for the improper motive of interfering with specific rights provided for under the NLRA.

ARGUMENT

I. THE BOARD AND THE SIXTH CIRCUIT FAILED TO PROPERLY APPLY AND ANALYZE WELL-ESTABLISHED PRECEDENT

A. THE DEVELOPMENT OF THE "SHAM" LITIGATION STANDARD PRIOR TO *BILL JOHNSON'S*

Precedent related to the question before this Court can be traced back to *W.T. Carter & Brother*, 90 NLRB 2020 (1950). In that case, the employer had obtained an injunction in state court preventing union meetings, and had union organizers arrested for violating the injunction. *Id.* at 2021-22. In a two-to-one decision, the Board recognized the "basic right" of access to the court system, but noted that the right is limited by legal doctrines prohibiting malicious use of judicial proceedings for ulterior, retaliatory motives. *Id.* at 2023-24. Because, the Board held, the employer's motive in seeking the injunction was retaliatory in nature, it violated § 8(a)(1) of the NLRA, regardless of the fact that the employer had prevailed in obtaining the injunction. *Id.* at 2022-24.

In his dissent, Chairman Herzog agreed with the Board's finding that the employer's decision to seek the injunction was motivated by a desire to interfere with its employee's right to organize, but argued that "the traditional right of all to bring . . . contentions to the attention of a judicial forum" should not be deemed an unfair labor practice, regardless of the employer's motive in initiating the litigation. *Id.* at 2029.

The Board soon demonstrated dissatisfaction with the *Carter & Brother* decision. For example, in *Texas Foundries,*

Inc., 101 NLRB 1642 (1952), *enforcement denied*, 211 F.2d 791 (5th Cir. 1954), the Board agreed with the trial examiner's holding that a lawsuit brought by an employer to halt picketing was not an unfair labor practice. Keys to the examiner's holding were his findings that the suit was based upon probable cause *and* that the employer was not motivated by an impermissible purpose. *Id.* at 1689 (holding that "I am not convinced that there exists in this case . . . a sufficient basis for finding that the state court process was invoked maliciously, abusively, and in bad faith not to protect legitimate interests under state law . . . ."). Thus, only two years after holding that the party's motive for bringing a court action determined whether or not the action was an unfair labor practice, the Board changed course, and opined that the only suits that are groundless *and* brought for improper reasons violate the NLRA.

In 1960, the Board made it clear that it was charting a course in diametric opposition to the holding in *Carter & Brother*. In *Clyde Taylor*, 127 NLRB 103 (1960), the employer had (i) threatened to file a libel lawsuit against five former employees who had filed unfair labor practice charges after they were terminated for union organizing activities and (ii) obtained an injunction in state court against fellow workers' peaceful picketing in protest of the terminations. Although the Board opined that the threat of a lawsuit violates the NLRA, it held that the actual filing of a suit could not be an unfair labor practice, regardless of the merits of the suit or the motive in filing it. *Id.* at 109-10.

The *Clyde Taylor* holding that the right to seek judicial redress could not qualify as an unfair labor practice, regardless of the merits or motive of the litigation at issue, enjoyed consistent application by the Board for years afterwards. For example, in *Fashion-Fair, Inc.*, 159 NLRB 1435, 1449 (1966), the Board held that an employer's lawsuit brought in state court to enjoin employees from picketing could not support an unfair labor practice charge, even though the lawsuit had no

basis in state law and even though the Board found the suit to have been motivated by the employer's "desire to harass the picketers in the exercise of their protected concerted activities." *See also United Aircraft Corp.*, 192 NLRB 382, 384 (1971) (noting that "since the [*Clyde*] *Taylor* case, the Board has consistently held that the filing of a civil suit cannot be found to be an unfair labor practice") (listing cases).

The Board's bright-line rule set forth in *Clyde Taylor* was modified a decade and a half later in the case of *Television Wisconsin, Inc.*, 224 NLRB 722 (1976). In that case, the union had filed suit against ten former members who resigned their membership prior to a strike, worked during the strike, and circulated decertification petitions. *Id.* at 779. The suit was based in part upon the union's claim that the defendants had violated the union security clause in the collective bargaining agreement. *See id.*

The Board upheld the Administrative Law Judge's ("ALJ") ruling that the union's lawsuit was an unfair labor practice. *Id.* at 722. But in doing so, the Board differed with the ALJ, and stated that the lawsuit was not an unfair labor practice "because of the Union's subjective intent," but rather it amounted to an unfair labor practice "because of the unlawful objective sought by the Union," namely, the enforcement of an illegal union security clause. *Id.* at 722 n.2.

Only nine days after issuing its opinion in *Television Wisconsin*, the Board again illustrated that it had modified the *Clyde Taylor* test and adopted the two-pronged test followed by the Board in *Texas Foundries*. In *International Organization of Masters, Mates & Pilots* ("IOMMP"), 224 NLRB 1626 (1976), the union brought an unsuccessful in rem action against a ship, seeking lost wages for union members who the IOMMP alleged had been unjustly discharged. *Id.* at 1629-30. In upholding the ALJ's finding that the suit was an unfair labor practice, the Board held that (i) the suit "may not have been [brought] in complete good faith" and (ii) the union

had pursued the lawsuit as part of a "larger objective," namely, forcing the employer to agree to an IOMMP contract. *Id.* at 1626, 1634.

Taken together, *Television Wisconsin* and *IOMMP* stand for the proposition that, in order for an unsuccessful lawsuit to qualify as an unfair labor practice, it must be demonstrated both that the suit lacked a good-faith basis in law *and* that it was brought for an improper ulterior motive, namely, to violate the defendant's NLRA rights.[5]

The Board continued to apply such two-pronged test in *Power Systems, Inc.*, 239 NLRB 445 (1978), *enforcement denied*, 601 F.2d 936 (7th Cir. 1979). In that case, the employer sued a former employee for, inter alia, the employer's costs and fees expended in defending itself against the employee's unfair labor practice charges and OSHA complaints. The employer also sought to enjoin the employee from filing any additional administrative or judicial proceedings against it.[6] *Id.* at 445-47. The employer subsequently voluntarily dismissed its request for injunctive relief. *Id.*

The Board, relying upon, inter alia, *Television Wisconsin* and *IOMMP*, noted that under well-established precedent a

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[5] *Cf. Lodges 743 & 1746 Int'l Assoc. of Machinists & Aerospace Workers*, 534 F.2d 422, 463-65 & n.85 (2d Cir. 1975) (holding that employer's lawsuit could not qualify as "malicious prosecution" because the employer had prevailed, therefore the Board could find the lawsuit to be an unfair labor practice only if it was shown that the "court's processes" had been used for "collateral purposes not related to the suit in question.") (citing W. Prosser, *Law of Torts* § 121 at 857 (4th ed. 1971) and F. Harper & F. James, *The Law of Torts* § 4.9 at 330-33 (1956)).

[6] The employer's desire for an injunction was likely motivated by the fact that, in addition to the two administrative charges the employee had filed against it, the employee had filed no less than 45 charges against multiple labor organizations and employers in years prior. *See Power Sys., Inc.*, 239 NLRB at 446.

lawsuit (whether filed by a union, employee, or employer) amounts to an unfair labor practice only where it is shown that the suit has "no reasonable basis" in the law and was brought "to penalize the other party for exercising protected rights." *Id.* at 449-50 & n.18. Because the Board found the employer's suit against the employee to have "no reasonable basis" and to have been brought for the purpose of harassing the employee, the Board held that the suit was an unfair labor practice. *Id.*

On appeal, the Seventh Circuit denied enforcement on the ground that the record contained insufficient support for the Board's ruling that the employer had lacked a reasonable basis for filing suit or that the employer had an improper motive for such suit. *Power Sys, Inc.*, 601 F.2d at 939-40. Thus, the state of the law at the time *Bill Johnson's* came before this Court was that federal and state court litigation could amount to an unfair labor practice only if it had no reasonable basis in law and was brought for impermissible ulterior reasons. *See id.*; *see also, e.g., Associated Gen. Contractors*, 245 NLRB 328, 331 (1979) (holding that, where employer's lawsuit against the union had been dismissed, such suit was not an unfair labor practice because it was "filed in good faith to enforce colorable contract rights" and because the evidence "fail[ed] to reveal that [the employer's] object in filing the suit was to engage in reprisal . . . .").

B. THE SUPREME COURT'S DECISION IN *BILL JOHNSON'S*

The facts and procedural posture underlying the *Bill Johnson's* decision are as follows: management employees had, on a number of occasions, threatened picketing employees, promising "to get even with them" and threatening that employees would "get hurt" if they continue to picket. *Bill Johnson's*, 461 U.S. at 733-34. The employer then filed a lawsuit in state court seeking to enjoin the employees from picketing, claiming that the employees had libeled it by distributing leaflets allegedly containing "false and outrageous

statements . . . with the malicious intent to injure" the employer, and bringing state law claims of interference with the employers business. *Id.* at 734. The employees filed an unfair labor charge the following day, claiming that the employer's civil suit had been brought in retaliation for the employees' union activities and because they had previously filed charges under the NLRA. *Id.* at 734-35. The ALJ found that the charges had merit.[7]

On appeal, the Board upheld the ALJ's ruling and adopted it "with minor exceptions." *Id.* at 737. The Ninth Circuit then enforced the Board's Order, holding that "substantial evidence supported both the Board's findings that the employer's 'lawsuit lacked a reasonable basis in fact and that it was filed to penalize [the employees] for engaging in protected activity.'" *Id.*

In its opinion, the Court addressed the narrow question of the standard the Board should apply when a party seeks to enjoin another party from pursuing a lawsuit. *Id.* The Court addressed only the employer's libel suit. The Court first traced the evolution of the law in this area back to *Carter & Brother*, and concluded that "[s]ince 1978, the Board has consistently adhered to the *Power Systems* rule that an employer or union who sues an employee for a retaliatory motive is guilty of a violation of the Act." *Id.* at 739. The Court then noted that "[t]here are weighty countervailing considerations . . . that militate against" allowing the Board to enjoin a lawsuit solely on the basis of the motive behind the suit. The Court noted two main concerns: the "First

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[7] Prior to the hearing, the state court had rejected the employer's request for a preliminary injunction. Moreover, while the ALJ was considering the employees' unfair labor practice charges, the state court granted the employees' motion for summary judgment and dismissed the business interference claims, but left the employer's libel claim for trial. *Bill Johnson's*, 461 U.S. at 735 & n.2. The state court also simultaneously dismissed the employees' cross claim for abuse of process. *Id.*

Amendment rights to petition the government for redress of grievances" and "the States' compelling interest in the maintenance of domestic peace." *Id.* at 741. Because of these two compelling interests, the Court concluded that the Board may enjoin a lawsuit only upon a determination that (i) the suit lacks a reasonable basis and (ii) the suit was brought for an improper motive. *Id.* at 743.

The Court in *Bill Johnson's*, after finding that the employers litigation was baseless and brought for an improper motive, agreed with the Board that as a remedy the employer could be assessed the union's attorneys fees and costs in defending against such litigation.

The Court in *Bill Johnson's* did not, however, have before it a situation where — as contrasted to the instant matter — the litigation in question had been completed. The Court in dicta, did briefly discuss situations where the non-NLRA litigation had been completed. Contrary to the Board and the Sixth Circuit, the Court, however, did not state that a plaintiff in non-NLRA federal and state court litigation presumptively has engaged in illegal conduct pursuant to the first prong or step of any applicable test because the litigation in question was not successful in all respects. Stated alternatively, the *Bill Johnson's* court did not hold that an unsuccessful lawsuit by definition is "objectively baseless" litigation. Further, the Court in *Bill Johnson's* did not conclude that, if a finding that unsuccessful litigation had been pursued, the only inquiry left for the Board to determine was whether the party bringing the litigation at issue did so with an improper ulterior motive. Accordingly, while *Bill Johnson's* is precedent that is important to review in analyzing the instant matter, it is not dispositive of the issue herein.

C. APPLICATION OF THE RULE AFTER *BILL JOHNSON'S*

Albeit incorrectly, after *Bill Johnson's*, most Board and certain court opinions interpreted the Supreme Court's dicta in

Bill Johnson's as requiring the Board to equate a loss in state court with lack of a reasonable basis for bringing the suit, thereby limiting the Board's inquiry to seeking proof of improper intent, which, circularly, could be adduced, at least in part, by the failure of the party initiating the action to prevail.[8] *See, e.g., Bill Johnson's Rests., Inc.*, 290 NLRB 29, 29-32 (1988) (on remand); *Diamond Walnut Growers, Inc. v. NLRB*, 53 F.3d 1085, 1087-88 (9th Cir. 1995). Other decisions have, however, correctly determined that this interpretation of *Bill Johnson's* is problematic, and flies in the face of the well-established law governing the right of access to courts and the doctrines governing frivolous lawsuits, malicious prosecution, and abuse of process. *See, e.g., Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 30-35 (D.C. Cir. 2001) (noting that the *Bill Johnson's* dicta creates an anomaly in the jurisprudence governing frivolous lawsuits and musing that "[p]erhaps the Supreme Court will one day create a uniform standard for sham litigation governing both the NLRA and non-NLRA cases . . . ."); *White v. Lee*, 227 F.3d 1214, 1234-37 (9th Cir. 2000) (discussing the Ninth Circuit's application of the dicta of *Bill Johnson's* and noting that it amounts to an "apparently contradictory position" with the Court's other rulings regarding the right to seek judicial redress of controversies).

A review of the Board precedent in this area as outlined above, and the corresponding circuit court precedent, does not support, as a matter of law, the Board's and lower court's conclusion that BE&K initiated litigation against the unions in question that was "objectively baseless." Indeed, just the opposite conclusion can be drawn as there is substantial

[8] The Board also held that BE&K's voluntary dismissal of certain causes of action could be regarded as the equivalent to a showing that its litigation lacked merit. *BE&K Const. Co.*, 329 NLRB No. 68 (1999). Such a finding, *Amici* submit, is also clear legal error.

precedent to support the legal bases for BE&K's litigation initiatives.[9]

Finally, by granting certiorari in this case, the Court not only has the opportunity to reverse the decision below, but also to clarify its dicta in *Bill Johnson's*, and to establish a uniform standard governing the pursuit of frivolous or "sham" litigation that is true to the Court's jurisprudence in other areas.

II. THE FIRST AMENDMENT RIGHT TO PETITION REQUIRES THE USE OF AN "OBJECTIVELY BASELESS" STANDARD AS A MINIMUM THRESHOLD BEFORE A VIOLATION CAN BE ESTABLISHED UNDER THE NLRA FOR "SHAM" LITIGATION

In the instant matter, the lower court's standard for evaluating "meritless" litigation violates fundamental principles related to citizens' right to petition the government. That right is "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers*, 389 U.S. at 222 (1967).

The right to petition is "implicit in the very idea of government, republican in form." *McDonald v. Smith*, 472 U.S. 479, 482 (1985) (quotation and bracket omitted). Indeed, "[t]he Petition Clause . . . was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble." *Id.* at 485. "[T]he values in the right

[9] Under any scenario, BE&K should not be found guilty of an unfair labor practice in this matter, since it is clear from reviewing the Board's decision that new "law" has been developed by the Board in this case. Accordingly, if the decision below is not reversed, the Board's new approach to this area of the law should only be applied prospectively. *See Epilepsy Found. of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1102-03 (D.C. Cir. 2001) (holding that the Board's new position on the application of *Weingarten* rights to non-union employees should be applied only prospectively).

of petition as an important aspect of self-government are beyond question." *Id.* at 482.

Consistent with the central role that the right to petition plays in a representative democracy, the right should not be abridged through governmental action "except in the most extreme circumstances 'without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions.'" *McDonald*, 472 U.S. at 486 (Brennan, J. concurring) (quoting *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937)). A long line of right to petition jurisprudence supports this premise.

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, the Court rejected an interpretation of the Sherman Act that would have allowed liability based on petitioning the government. *See* 365 U.S. 127, 137-39 (1961). As the Court explained, "we cannot, of course, lightly impute to Congress an intent to invade" the freedoms protected by the Bill of Rights, including the right of petition. *See id. at 138.*

The only exception to immunity for petitioning that the Court has identified is outlined in its decision in *Noerr-Pennington*. Such exception is for "mere sham" activities. *See id.* at 144. In particular, the Court found that the application of the statute—and thus the removal of First Amendment immunity—"would be justified" when petitioning "ostensibly directed toward influencing governmental action, *is a mere sham* to cover . . . an attempt to interfere directly with the business relationships of a competitor." *Id.* at 144 (emphasis added).

While the *Noerr-Pennington* doctrine initially arose in an antitrust context, its rationale applies in many other contexts, as this Court has previously noted. *See Prof'l Real Estate Investors v. Columbia Pictures Indus., Inc.*, 508 U.S. at 58-59 (stating that [w]hether applying *Noerr* as an antitrust doctrine *or invoking it in other contexts* . . ." and equating "sham" litigation in the antitrust context and "baseless" litigation in

the labor context) (emphasis added); *see also, e.g., Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1092 (9th Cir. 2000) (concluding that "[t]he immunity is no longer limited to the antitrust context"). These, and other cases have recognized, there is no logical reason to limit the *Noerr-Pennington* doctrine to antitrust cases. Indeed, there is no reason that a claim under the NLRA should be allowed to abridge or chill the First Amendment right to petition to a greater extent than in the antitrust context.

The *Bill Johnson's* case was another application of the *Noerr-Pennington* principle and reinforced that the same First Amendment right of access to courts should inform the Court's construction of the Act. *See* 461 U.S. at 741-43. The only issue that the Court considered in *Bill Johnson's* was "whether the Board may issue a cease-and-desist order to halt the prosecution of a state court civil suit brought by an employer to retaliate against employees for exercising federally-protected labor rights, without also finding that the suit lacks a reasonable basis in fact or law." *See id.* at 733. The Court concluded that "the Board may not halt the prosecution of a state-court lawsuit, regardless of the plaintiff's motive, *unless the suit lacks a reasonable basis in fact or law.*" *Id.* at 748 (emphasis added). The Court was not asked to consider what standard should be applied after the conclusion of the litigation to determine whether the employer's lawsuit was a "sham" and could therefore subject the employer to liability consistent with the First Amendment's right to petition.

The Court identified two different interests that courts have to consider in determining whether filing a lawsuit could violate § 8(a)(1) of the NLRA. The first was the right to petition, and the second involved interests arising from the "States' compelling interest in the maintenance of domestic peace." *See* 461 U.S. at 741-44; *see also Johnson & Hardin Co*, 49 F.3d at 242 (stating that the Court in *Bill Johnson's* "referred explicitly to the First Amendment right to petition the government for redress of grievances and the States'

compelling interest in maintaining domestic peace by providing a forum to its citizens for the redress of wrongs") (citing *Bill Johnson's*, 461 U.S. at 741-42).

In *Professional Real Estate Investors*, the Court clarified the standard for ensuring First Amendment rights in this context. The Court explained that "[o]ur decisions therefore establish that *the legality of objectively reasonable petitioning* 'directed toward obtaining governmental action' is 'not at all affected by any anti-competitive purpose [the actor] may have had.'" *Prof'l Real Estate Investors*, 508 U.S. at 59 (quoting *Noerr*, 365 U.S. at 140). As the Court explained:

> Since *California Motor Transport*, we have consistently assumed that the sham exception contains an indispensable objective component . . . . Whether applying *Noerr* as an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anti-competitive intent or purpose alone cannot transform otherwise legitimate activity into a sham. Indeed, by analogy to *Noerr's* sham exception, we held that even an "improperly motivated" lawsuit may not be enjoined under the National Labor Relations Act as an unfair labor practice unless such litigation is "baseless."

508 U.S. at 58-59 (internal citations omitted). Thus, since *Professional Real Estate Investors*, it has been this Court's guidance to the circuits—with no distinction between "injunction" cases and those resolved on the "merits"—that the First Amendment protects a plaintiff from liability unless the lawsuit is "objectively baseless."

The Court in *Professional Real Estate Investors* also issued an admonition to the lower courts. Such admonition foreshadowed the circumstances present here:

> [W]hen the antitrust defendant has lost the underlying litigation, a court must "resist the understandable temptation to engage in post hoc reasoning by concluding"

> that an ultimately unsuccessful "action must have been unreasonable or without foundation." The court must remember that "[e]ven when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit."

508 U.S. at 61, n.5 (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978)); *see also Prof'l Real Estate Investors*, 508 U.S. at 60 (concluding that antitrust and labor issues could override right to petition only when a lawsuit is "objectively baseless" such that "no reasonable litigant could realistically expect success on the merits"). Taken together, these cases mandate that "unmeritorious" or "sham" should not be construed so narrowly as to mean that any time an employer does not prevail as a plaintiff it can be held liable under the NLRA because there is a right to petition interest that must be considered, *even after* the close of unsuccessful litigation.

As explained above, *Bill Johnson's* did not address the First Amendment implications of liability for an unsuccessful plaintiff once the litigation has run its course, much less the case of a plaintiff who filed its action in good faith but simply lost on the merits, no matter how "close" the result. Thus, the language on which the lower court relied in this case is dicta. Further, the lower court's decision does not address the First Amendment issue in the post-litigation situation, other than to, in effect, assume that there is *no* such interest once litigation has been completed. That is contrary to this Court's guidance in *Bill Johnson's*, as made clear in *Professional Real Estate Investors*.

Finally, the court of appeals' standard does not consider the possibility of any less restrictive means of controlling frivolous lawsuits. If a plaintiff brings a baseless lawsuit, an aggrieved party has several remedies that do not directly impinge on First Amendment rights, including claims for abuse of process and sanctions under Rule 11. *See generally*

United States v. Robel, 389 U.S. 258, 268 (1967) (stating that a statute that "imposes a substantial burden on protected First Amendment activities" must meet its goals "by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms"); *A Petition Clause Analysis of Suits Against The Government: Implications For Rule 11 Sanctions*, 106 Harv. L. Rev. 1111, 1122 (Mar. 1993) ("when courts apply Rule 11 sanctions to complaints, courts punish citizens' presentation of judicial petitions.")

The practical effect of the Board's and lower court's standard would be to hold that any time an employer's lawsuit against labor organizations is unsuccessful—including voluntarily dismissed—there is a substantial likelihood that the Board will find a violation of the NLRA irrespective of the employer's good faith in filing suit and irrespective of the "merit" of the action. That rule completely disregards the Court's prior rulings that the First Amendment and the right to petition protect all but "sham" litigation, as set forth in *Professional Real Estate Investors* and *California Motor Transport*. Indeed, under the court of appeals' rule, the only way to avoid an unfair labor practice finding is to either not initiate litigation in the first instance, no matter how valid the claim appears to be at the outset, or pursue litigation in a very aggressive posture and obtain a "victory" in all areas. Certainly, voluntary dismissal, or perhaps even settlement would, pursuant to the Board's BE&K standard, not be safe harbors for an employer litigant. Under this approach the General Counsel of the Board would not need to introduce any evidence that the lawsuit was subjectively or objectively baseless or that the employer acted for retaliatory reasons in filing the action.

Instead, those elements are essentially presumed, in what is apparently an irrebuttable presumption test. Such "irrebuttable" presumption test amounts to an emasculation of the First Amendment right to petition for redress for parties that are involved in a labor dispute.

Faced with the choice of having to prevail or risking the possibility of losing, being found, ipso facto, of having committed an unfair labor practice and being forced to pay the union's attorneys fees, no doubt many, if not most, employers will be forced to forego exercising their right to petition. If BE&K's action was unlawful, even though it was filed and maintained with experienced counsel and in defense of plainly improper non-employee conduct, then every time an employer files a lawsuit against a labor organization, the employer is facing a potential unfair labor practice, even for non-"sham" litigation. The court of appeals' decision will chill businesses' right of access to the courts because of the extreme—if not unavoidable—risk of being conclusively presumed to have committed unfair labor practices.

BE&K, and other employers faced with like circumstances, have the right to expect the same First Amendment protection to petition the courts for redress as litigants do in other areas of the law without the imposition of findings of unlawful activity and potential harsh remedies. Such parties should also have the same right to rely upon precedent in evaluating litigation options as parties do in other areas of the law. Indeed, after reviewing the substantial precedent in support of the Petitioner's position in the instant matter, *Amici* respectfully submit that the instant matter is not even a "close" case and that the Board, not BE&K, has come perilously close to being the party that should be required to reimburse attorneys fees and costs.

III. THE LOWER COURT'S DECISION IS NOT ONLY LEGALLY WITHOUT SUPPORT BUT IT ALSO IS NOT GOOD PUBLIC POLICY AND IS INCONSISTENT WITH THE CHECK AND BALANCE SYSTEM PROVIDED FOR BY THE NATIONAL LABOR RELATIONS ACT

The decision of the NLRB in the instant matter has sanctioned an employer for responding to arguably

unprotected tactics and legally questionable actions developed by unions as part of the "corporate campaign." Because the NLRB has failed to confront this relatively new tactic of "economic warfare"[10] being utilized by organized labor, it is necessary to outline the process to provide context for this Court in addressing the substantive legal issues presented by the Petitioner which are outlined in Sections I and II, *infra*. Specifically, the decision below is not consistent with the letter or spirit of the NLRA because it punishes employers who resist illegal and unprotected corporate campaign tactics by seeking recourse to the civil courts.

A. THE CHECKS AND BALANCES OF THE NATIONAL LABOR RELATIONS ACT

The NLRA is founded upon a model which anticipates the potential for adversarial relationships. The Act anticipates that the relationships between labor unions and employers can become contentious, but seeks to resolve those disputes through non-confrontational means. In short, "[t]he primary purpose of the Act is to minimize industrial conflict by channeling it into an adversarial arms-length bargaining system." S. Rep. No.74-573 (1935).

Accordingly, Congress, in constructing the Act, fully anticipated that the nation's unions and management would occasionally resort to "economic warfare," but sought to mitigate the ferocity of the conflict through the statute. The underlying legislation to the Act was drafted to address "sharp outbreaks of economic warfare." 78 Cong. Rec. 4229, 4230 (1934).

Indeed, this Court has acknowledged that the effective operation of the NLRA will include the sporadic resort to economic weapons and economic warfare by the parties.

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[10] *NLRB v. Boston Med. Ctr. Corp.*, 330 NLRB No. 30 (Nov. 26, 1999) (Member Brame, dissenting).

> It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for the truth—or even with what might be thought to be the ideal of one. The parties —even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. . . . The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.

NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 488-489 (1960).

Members of the NLRB have recognized that the traditional tools of labor and management are anticipated in the process of the NLRA. For example, strikes and lockouts have been found to be legitimate checks and balances in the operation of the statute. "[W]hen efforts to bargain break down, as they inevitably will in some cases, the Act contemplates that the parties will resort to "economic warfare," including strikes and lockouts to resolve their differences. . . . Striking employees withhold their labor for the purpose of pressuring an employer to accede to their demands. . . ." *NLRB v. Boston Med. Ctr. Corp.*, 330 NLRB No. 30 (Nov. 26, 1999) (Member Brame, dissenting) (footnote omitted), *see also*, *NLRB v. Cent. Ill. Pub. Serv. Co.*, 326 NLRB 928 (1998) (conversely, an employer is free to operate its business, with or without replacement employees, and in certain circumstances may lockout striking employees).

Organized labor has expanded the arsenal of weapons it engages in economic warfare, and the weapon at issue here—the corporate campaign—is one which the NLRA does not prescribe a check or counter-balance. The absence of a remedy under the NLRA for illegal and unprotected corporate

campaign activity naturally leads employers to the civil courts. However, under the current rule as interpreted by the NLRB below, employers are confronted with severe sanctions if they seek recourse in the civil courts, necessarily tilting the desired "level playing field" in labor relations considerably in favor of organized labor.

B. OVERVIEW OF UNION CORPORATE CAMPAIGNS

A corporate campaign is a coordinated attack by a union using a variety of economic, legal, political, and psychological weapons against a corporation that has opposed unionization, refused to agree to the union's bargaining demands, or in some other way refused to yield on some issue of great importance to the labor organization waging the campaign. The attack is waged in numerous forums. including regulatory agencies and the courts. The attack is intended to tarnish the image, and undermine the reputation, of the targeted company through constant and unyielding pressure and to cause so much disruption that management is forced to surrender to the union's demands.[11] But most of all, it is warfare which unions have chosen to undertake outside the confines of the representational procedures of the Act.

Courts are beginning to acknowledge the destructive nature of these attacks. The Court of Appeals for the District of Columbia Circuit defined corporate campaigns as:

> a wide and indefinite range of legal and potentially illegal tactics used by unions to exert pressure on an employer. These tactics may include, but are not limited to, litigation, political appeals, requests that regulatory agencies investigate and pursue employer violations of state or federal law, and negative publicity campaigns aimed at

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[11] *See generally*, J. Manheim, *The Death of A Thousand Cuts: Corporate Campaigns and The Attack on the Corporation*, p. xiii (2001).

> reducing the employer's goodwill with employees, investors, or the general public.

Food Lion, Inc. v. United Food & Commercial Workers, 103 F.3d 1007, 1014 n.9 (D.C. Cir. 1997). However, long before this, unions themselves have described the strategy more succinctly:

> [C]orporate campaigns . . . swarm[] the target employer from every angle, great and small, so that corporate officers are always aware of the effects of their decreases on the rank and file. It's the death of a thousand cuts rather than a single blow.

Union Officials Stress International Scope of Organizing, Bargaining Campaigns, Daily Lab. Rep. (BNA) [at A-5 Nov. 16, 1992) (quotation and citation omitted).

The AFL-CIO Industrial Union Department ("IUD") defines a corporate campaign as one which:

> Applies pressure to many points of [corporate] vulnerability to convince the company to deal fairly and equitably [from the union's point of view] with the union. . . . It means vulnerabilities in all of the company's political and economic relationship—with other unions, shareholders, customers, creditors, and government agencies—to achieve union goals.

Developing New Tactics: Winning with Corporate Campaigns, Industrial Union Department, AFL-CIO at 1 (1985). And, according to Ray Rogers, who claims to have initiated corporate campaign strategies:

> "[W]e develop a campaign strategy that has a beginning point A and an end point Z. Point Z is total defeat or annihilation of your adversary."

Quoted in, D. La Botz, *The Troublemaker's Handbook* at 128, (A Labor Notes Book 1991). According to *The Troublemaker's Handbook*, such campaigns "are effective

when they inflict costly consequences on the target company or its allies." *Id.* at 127.

Manuals, such as *Developing New Tactics: Winning with Corporate Campaigns* and *The Troublemaker's Handbook*, have been published by several union-affiliated organizations, individual unions, and the AFL-CIO to guide local unions in waging corporate campaigns. These manuals explain the rationale behind corporate campaigns and provide tactical suggestions and organizational templates. It is clear from the manuals that unions view federal and state law as a means to harass employers:

> Both public institutions and private companies are subject to all sorts of laws and regulations, from the Securities and Exchange Commission to the Occupational Safety and Health Act, from the Civil Rights Act to the local fire codes. Every law or regulation is a potential net in which management can be snared and entangled.

A Troublemaker's Handbook, *supra* at 127.

Part of ensnaring management is using regulatory agencies to harass management. The IUD's manual, *Developing New Tactics: Winning with Corporate Campaigns*, *supra*, phrased it this way:

> Businesses are regulated by a virtual alphabet soup of federal, state, and local agencies, which monitor nearly every aspect of corporate behavior. Although these watchdog agencies employ inspectors to monitor compliance by companies, most rely on employees and other individuals to file complaints about violations. Once the regulators are alerted by a company, they sometimes assume an adversarial relationship toward the offender.

Id. at 6. The Service Employees International Union's ("SEIU") Manual clearly sums up the purpose for which unions utilize regulatory agencies in corporate campaigns:

> Moreover, even if the violations are completely unrelated to bargaining issues, your investigations may give management added incentive to improve its relationship with you. Management officials may find that . . . the employer now is facing . . .
>
> — Extra expense to meet regulatory requirement or qualify for necessary permits and licenses.
>
> — Costly delays in operations while those requirements are met.
>
> — Fines or other penalties for violating legal obligations.
>
> — Damage to the employer's public image, which could jeopardize political or community support, which in turn could mean less business or public funding.

SEIU Contract Campaign Manual, 3-21 (1988).

As these manuals demonstrate, in a typical corporate campaign, unfair labor practice charges are filed with the Board, safety complaints with the Occupational Safety and Health Administration ("OSHA"), charges generated with the Environmental Protection Agency ("EPA"), and protests filed to petitions for local building permits, sometimes by cooperating "public interest" groups. Expensive litigation and bad publicity for corporations frequently result. At the same time, little thought or attention is given to the representational wishes of the employer's employees, *i.e.*, such employees frequently have not requested and may even oppose the union's pressure tactics against their employer.

Thus, in an article entitled *The Pressure is On: Organizing Without the NLRB*, by Joe Crump, Secretary-Treasurer of the United Food and Commercial Workers ("UFCW"), Local 951, the union author provides an extremely candid and graphic discussion of the intent of unions during a corporate campaign. J. Crump, *The Pressure Is On: Organizing Without the NLRB*, 18 Lab. Res. Rev. 33 (1992). In his article, Crump describes

his local's "success" against Family Foods, a supermarket chain, in Kalamazoo, Michigan:

> After a three-year struggle, the battle with Family Foods is over. Do we represent the employee? No. The company went out of business. The good news is that some of the stores were purchased by companies already under a Local 951 contract. A couple of stores are empty, but I am sure that many of the former patrons are now shopping in unionized stores. Perhaps even more important is the message that has been sent to nonunion competitors: There is no "free lunch" in our jurisdiction.

Id. at 35. The local succeeded in putting the company out of business after engaging in a corporate campaign that targeted several demographic groups and using a different approach for each. For example, the UFCW targeted senior citizens by accusing the company of taking excess pension funds.

In another case, in mid-1993, the United Steelworkers ("Steelworkers") announced a corporate campaign against Bayou Steel in LaPlace, Louisiana, where a strike of several months had been in progress, but the company continued to operate. For three difficult years— from August, 1993 through September, 1996—the Steelworkers waged an exhausting corporate campaign against the steel company.[12] As part of its corporate campaign, the Steelworkers filed numerous complaints with the Louisiana Department of Environmental Quality, causing the Louisiana agency to react strongly after numerous unsupported allegations of

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[12] On October 29, 1997, Bayou Steel and the Steelworkers entered into a confidential settlement agreement ending the company's Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68, ("RICO") lawsuit based on the Steelworkers' corporate campaign. *See* H. Northrup and C. Steen, *Union "Corporate Campaigns" As Blackmail: The RICO Battle at Bayou Steel*, 22 Harv. J.L. & Pub. Pol'y 771, 773 (Summer 1999).

environmental offenses. Its deputy secretary wrote the chairman of the local union safety committee as follows:

> The numerous special inspections in response to your frequent unsupported allegations have not resulted in any findings of significant danger to the environment or human health, nor an emergency, nor the discovery of an abandoned hazardous waste site, nor any findings of significant violations of the Environmental Quality Act. This office can no longer reasonably believe your unsupported allegations against the above referenced facility. Submit significant, verifiable evidence to support your allegations against the above referenced facility, and this office will investigate in an appropriate manner.

H. Northrup, *Corporate Campaigns: The Perversion of the Regulatory Process*, 17 J. Lab. Res. 345, 353-54 (Summer 1996) (hereinafter cited as *The Perversion of the Regulatory Process*) (quoting letter from Filmore F. Bordelson, III, Deputy Secretary, Louisiana, Department of Environmental Quality, to Maurice Simoneaux, Chairman, Safety and Health, United Steelworkers, Local 9121, Nov. 17, 1994). The "significant, verifiable evidence' was never forthcoming. Meanwhile, despite the state inspections, the federal EPA insisted on inspections of its own, thus subjecting this small company to further harassment. After two inspections and numerous information requests over a ten-month period, the EPA confirmed the state agency's findings that there were no major environmental violations at Bayou Steel. *Id.* at 354 (citing, V. Hyman, *Steel Mill Clean, EPA Probe Says*, Money, Apr. 26, 1995, at C-1). These are only a few of the many examples of companies that have been victimized by corporate campaigns waged against them by unions.[13]

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[13] For further discussion of the corporate campaigns waged against various companies, *see generally*, J. Manheim, *The Death of A Thousand Cuts: Corporate Campaigns and the Attack on the Corporation*, (2001); H.

C. THE NLRB'S BE&K STANDARD ENCOURAGES THE ILLEGAL AND UNPROTECTED TACTICS OF A CORPORATE CAMPAIGN

Employers victimized by illegal and unprotected corporate campaign tactics are unable in a vast majority of situations to seek relief before the NLRB, and are subject to sanction by the NLRB for pursuit of a remedy before the Courts, as evidenced in the instant matter, thereby destroying the parity sought by federal labor law between labor and management.

Unions are not protected by the NLRA when they take actions solely to injure an employer. In *Tradesmen Int'l Inc.*, 332 NLRB No. 107 (Oct. 31, 2000), a union organizer participated in a public hearing before the City of Lorain, Ohio. The organizer testified that Tradesmen should be subject to a city ordinance which required certain contractors to post surety bonds when doing business in the city. The organizer subsequently applied for employment with Tradesmen, a corporate campaign tactic known as "salting," and was not hired. The organizer alleged successfully before the NLRB that the employer had refused to hire him based upon his testimony to the city, and that the conduct was protected activity under the Act as it was engaged in for the mutual aid and protection of employees.

The D. C. Circuit vacated the decision of the NLRB as the conduct of the organizer in publicly criticizing the employer was not for the mutual aid and protection of employees and therefore was not protected by the Act. The Court focused on

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Northrup, *The Perversion of the Regulatory Process, supra*, (discussing corporate campaigns against various companies including Nordstrom and the International Paper Company); T. DiLorenzo, *The Corporate Campaign Against Food Lion: A Study of Media Manipulation*, 17 J. Lab. Res. 359 (Summer 1996); C. Gangemi, Jr. and J. Torres, *The Corporate Campaign at Caterpillar*, 17 J. Lab. Res. 377 (Summer 1996).

the desired impact of the organizer's conduct in resolving the matter, noting that "[i]n the present case, Oakes's activity was not an effort to improve any employees' (union or non-union) working conditions. So far as the record shows, it was solely an effort to raise Tradesmen's costs." *See Tradesmen Int'l v. NLRB*, 275 F.3d 1137, 1143 (D. C. Cir. 2002).

As noted, unions admit that they design corporate campaign tactics to create unnecessary expenses for employers. *See Contract Campaign Manual*, 3-21 *supra*. Where this is the sole motivation for the union's, or its agent's conduct, the D. C. Circuit concluded accurately that the union loses its § 7 NLRA protections:

> The Board's decision suggests a new standard that any activity that raises a non-union employer's costs "levels the playing field" between union and non-union employers, even if unrelated to working conditions or union/non-union status, and is therefore protected under the Act . . . . But such a standard effectively erases any line between acceptable and unacceptable activity directed toward an employer's economic health. We reject this sweeping and unprecedented expansion of "concerted activity for mutual aid or protection."

Tradesmen Int'l, 275 F.3d at 1143.

The D.C. Circuit in *Tradesmen* was correct in rejecting the "unprecedented expansion of concerted activity for mutual aid or protection" that is implicit in the core definition of corporate campaigns. The instant matter is yet another example of the Board's improper expansion of "mutual aid and protection" concurrent with harsh remedies. *Amici* respectfully request that this Court clearly and decisively reject such expansion by the Board and re-establish the balance of rights of employers and labor organizations under the NLRA.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

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